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FEDERAL COMMUNICATIONS COMMISSION
No. 97-100 OFFICE OF THE SECRETARY

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WT Docket No. 97-109

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PETITION FOR STAY

ClearComm, L.P. ("ClearComm"), formerly known as PCS 2000, by its attorneys and pursuant to Sections 1.41 and 1.44(e),¹ of the Commission's rules, hereby requests that the Commission grant this special request for an immediate, temporary stay of the proceedings in WT Docket No. 97-199, pending Commission review of ClearComm's Application for Review.² For the reasons set forth below, a stay of those proceedings is warranted because ClearComm is likely to prevail on the merits, ClearComm would be irreparably harmed absent a stay, a stay will not harm other parties and the public interest supports a brief delay in the hearing to resolve ClearComm's status.³ A stay will permit orderly consideration of the *Application* on an expedited basis and prevent unwarranted injury while the claim is under review.

In this case, the irreparable injury to ClearComm in the absence of a stay is complete and certain: if the Commission fails to grant a stay, and it follows procedures for comment on ClearComm's *Application*, Commission action will undoubtedly come only after the conclusion of the *Westel Samoa* hearings.⁴ That is, absent a stay of the proceedings in which ClearComm

¹ ClearComm is filing this request as a pleading separate from its Expedited Petition for Review in compliance with Section 1.44(e) of the Rules. 47 C.F.R. § 1.44(e).

² Application for Review of ClearComm, L.P. (filed Jan. 26, 1998) ("*Application*"), filed to seek intervention in proceedings related to Memorandum Opinion and Order, Westel Samoa, Inc., and Westel, L.P., WT Docket No. 97-199, FCC 98M-3 (Jan. 16, 1998) ("*Westel Samoa*") (Exhibit A).

³ See *Virginia Petroleum Jobbers Ass'n v. Federal Power Commission*, 259 F.2d 921 (D.C. Cir. 1958); See also, *Cuomo v. United States Nuclear Regulatory Commission*, 772 F.2d 972 (D.C. Cir. 1985); *Licensing of General Category Frequencies in the 806-809.750/851-854.750 MHz Bands*, 11 FCC Rcd 9707 (1995) ("The *sine qua non* for the grant of a motion for stay is a showing of irreparable injury that will result from the agency decision in the absence of injunctive relief.").

⁴ The Presiding Officer has scheduled the beginning of the hearing in this matter for Feb.

seeks to intervene, our *Application* will likely be rendered moot due to the schedule of the Westel proceeding. Thus, grant of the stay is the only means to ensure full consideration and satisfaction of ClearComm's right to interlocutory appeal as guaranteed by § 1.301(a)(1) of the Rules.

Further, when the Commission does act on ClearComm's *Application*, it is likely that ClearComm will prevail on the merits. For the reasons set forth in its *Application*, which are incorporated herein by reference, the Presiding Judge has failed to appreciate the gravity of the potential threat to ClearComm's interests posed by the facts and circumstances at the heart of the *Westel Samoa* proceedings.⁵ First, this hearing may result in findings that contradict established Commission findings of fact regarding the conduct of ClearComm in the PCS C Block Auction.⁶ Additionally, whatever novel factual determinations do arise in these proceedings are likely to affect ClearComm, its reputation before the Commission and the financial interests of its investors. Finally, as an intervening party in these proceedings and one that at all times was close to the events under consideration, ClearComm is in a position to assist in the discovery of evidence. For these reasons, ClearComm believes that Commission review of these circumstances will result in a grant of intervention.

(...Continued)

10. *See*, Order, Westel Samoa, Inc., and Westel L.P., WT Docket No. 97-99, FCC 97M-174.

⁵ *See*, *Application* at 2-5.

⁶ These facts were established by the Commission in a notice of apparent liability in which PCS 2000, ClearComm's predecessor, was fined \$1 million. *See*, *Applications of PCS 2000, L.P., Notice of Apparent Liability for Forfeiture*, 12 FCC Rcd. 1703 (1997) ("PCS 2000 NAL").

For their part, neither the participants in the *Westel Samoa* proceedings nor the public interest will suffer injury as a result of granting this emergency stay. The delay posed by such a stay will be minimal and can be easily measured by the time necessary for the Commission to consider ClearComm's *Application*. Such time is insubstantial, especially when contrasted with the irreparable nature of the harm to be suffered by ClearComm if this petition is denied.⁷

The public interest, moreover, strongly supports a stay. The public interest is furthered by a regulatory scheme that permits the full hearing of interlocutory appeals of orders from those who wield delegated authority. Even if ClearComm's *Application* is eventually not sustained – contrary to ClearComm's belief – a stay only preserves the status quo and the possibility of meaningful review by the Commission on such an important issue. Denial of this stay would merely raise the specter of potential abuse. That is, if the timing of decisions on matters subject to interlocutory appeal vitiate a party's right to such an appeal, the system would be effectively neutered – an outcome that can hardly be said to serve the public interest. Therefore, to discourage the potential for such eleventh-hour decisions, the grant of this stay is warranted and serves the public interest.⁸

⁷ *Celebrezze v. Nuclear Regulatory Commission*, 812 F.2d 288, 291-292 (6th Cir. 1987) (balancing harm to others against irreparable harm to petitioner and granting stay).

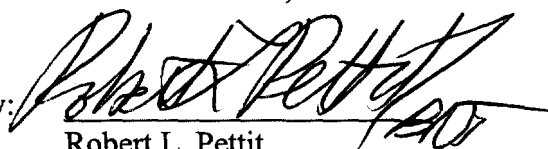
⁸ Such a stay may also be warranted based on the public interest in efficient use of Commission and private party resources. Mr. Easton, whose conduct lies at the very core of the *Westel* proceeding, has a pending motion for reconsideration before the Commission. It is possible that the Commission may decide that Mr. Easton should be subject to a hearing on the issue of his culpability for the underlying conduct as ClearComm's bidding agent in the Round 11 PCS C Block bidding – yet that conduct is central to Mr. Breen's *Westel* hearing as well. Therefore judicial and Bureau economy and the public interest may support a delay in Mr. Breen's hearing until Mr. Easton's status has been resolved – in order to permit *one* consolidated hearing regarding this conduct.

CONCLUSION

For the foregoing reasons, the motion for stay should be granted pending Commission action on ClearComm's Petition for Review.

Respectfully submitted,

CLEARCOMM, L.P.

By: 

Robert L. Pettit

Richard H. Gordin

David B. Silverman

of

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January 26, 1997

(...Continued)

ClearComm's bidding agent in the Round 11 PCS C Block bidding – yet that conduct is central to Mr. Breen's Westel hearing as well. Therefore judicial and Bureau economy and the public interest may support a delay in Mr. Breen's hearing until Mr. Easton's status has been resolved – in order to permit *one* consolidated hearing regarding this conduct.

CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of January, 1998, I caused copies of the foregoing
“Petition for Stay” to be hand-delivered to the following:

The Honorable Arthur I. Steinberg
Federal Communications Commission
Administrative Law Judge
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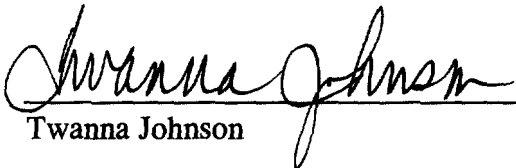

Twanna Johnson

EXHIBIT A

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In re Applications of:)	WT Docket No. 97-199
)	
WESTEL SAMOA, INC.)	File No. 00560-CW-L-96
)	
For Broadband Block C Personal)	
Communications Systems Facilities)	
)	
and)	
)	
WESTEL, L.P.)	File Nos. 00129-CW-L-97
)	00862-CW-L-97
For Broadband Block F Personal)	00863-CW-L-97
Communications Systems Facilities)	00864-CW-L-97
)	00865-CW-L-97
)	00866-CW-L-97

To: The Commission

APPLICATION FOR REVIEW

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January 26, 1998

ClearComm, L.P. ("ClearComm"), formerly known as PCS 2000, by its attorneys and pursuant to Sections 1.301(a)(1) and (c)(2) of the Commission's rules, hereby requests review of the Presiding Officer's January 16, 1998 Memorandum Opinion and Order¹ denying ClearComm's intervention in the above captioned proceeding.² As detailed below, the facts likely to be examined in the proceeding and the central role of ClearComm's corporate conduct in the underlying events to be considered therein requires that ClearComm's intervention be granted without delay.³

The alleged misconduct of ClearComm's agents for bidding during the C Block auction for the Norfolk, Virginia BTA -- including Anthony T. Easton, former Director and Chief Executive Officer of Unicom, and Quentin L. Breen, former Director of Unicom⁴ -- resulted in the imposition of a notice of apparent liability in the amount of \$1 million against ClearComm.⁵ The instant proceeding has its

¹ Memorandum Opinion and Order, Westel Samoa, Inc., and Westel, L.P., WT Docket No. 97-199, FCC 98M-3 (Jan. 16, 1998)(the "Order") (Attached as Exhibit A).

² For the Commission's convenience, appended hereto as Exhibits B through D are the pleadings filed in this matter. ClearComm's motion was supported by the Wireless Telecommunications Bureau but opposed by Westel.

³ ClearComm respectfully requests that the Commission act in an expedited fashion on its application for review, as the hearing is set to begin Feb. 10. *See*, Order 97M-173 (Oct. 20, 1997) (Ex. F). The subject motion to intervene was timely filed on Nov. 13, 1997 (before discovery started) but was not acted on until Jan. 14 -- more than two months after its filing, well after the end of discovery, and on the eve of the filing of direct cases. (The ruling was "released" on Jan. 16, but not mailed to ClearComm counsel until Jan. 20).

⁴ Subsequent to the bidding incident, ClearComm amended its applications to exclude Mr. Breen and Mr. Easton from any ownership or position of control. Memorandum Opinion and Order, Hearing Designation Order, Notice of Opportunity for Hearing and Order to Show Cause, WT Docket No. 97-199, FCC 97-322, (Sept. 9, 1997), at ¶ 7. ("HDO").

⁵ *Application of PCS 2000, L.P., Notice of Apparent Liability for Forfeiture* 12 FCC Rcd 1703, ¶ 55 (1997) ("PCS 2000 NAL"). Mr. Breen resigned from the Unicom Board of Directors on April 26, 1996. *See*, HDO at ¶ 34. Mr. Easton's interest in Unicom, held through the SDE Trust, was "squeezed out by the Unicom shareholders to cleanse the Applicant of those who made the misrepresentations."

genesis in the *same* alleged conduct, but now to review the character qualifications of Mr. Breen as a principal of Westel Samoa, Inc. and Westel, L.P. (collectively, “Westel”).⁶

Considering the elements of the case and their direct relationship to ClearComm’s interests, the Presiding Judge’s exclusion of ClearComm is clearly erroneous and should be reversed. First, this hearing may contradict the facts already established by the Commission in its *PCS 2000 NAL*. That is, the Presiding Officer has not established whether the facts regarding misrepresentation determined in the *PCS 2000 NAL* are to be taken as the law of the instant case. Indeed, when the Bureau sought to determine whether the facts underlying the *HDO* would be assumed true or re-examined in the upcoming hearing, the Presiding Officer did not decide the issue. The Bureau asked: “[A]re you taking it as a given that misrepresentations took place, or are you wanting that to be proven and then to flow from that what actions and knowledge Mr. Breen had thereafter?”⁷ The Judge responded: “[T]he answer to your question is I really don’t know.”⁸ With the scope of these proceedings thus undetermined, except for the obvious and central emphasis on Mr. Easton’s and Mr. Breen’s conduct as company officials, ClearComm should be permitted to intervene to protect its interests. As further detailed in Exhibit B, the potential for the production and review of evidence regarding events involving PCS 2000 places ClearComm’s petition squarely within the ambit of Commission precedent – cases in which the FCC has granted intervention when findings may “impugn [a licensee’s]

⁶ The Presiding Officer claims ClearComm has no interest in the “grant or denial of the [Westel’s] application.” Order at ¶ 9. Yet the only issue underlying the review of Westel’s application is Mr. Easton’s and Mr. Breen’s conduct as PCS 2000 officials. Their interests and ClearComm’s, therefore, cannot be separated.

⁷ Oct. 15, 1997 Hearing Conf., Tr. at 26. (Ex. E).

⁸ *Id.* at 26. Matters are further blurred by the Judge’s Order limiting the scope of deposition testimony and Mr. Easton’s subsequent refusal to testify regarding the underlying conduct. See Westel Samoa, FCC 97M-189 at ¶ 5. (Ex. G)

character and his ability to earn a livelihood in the communications industry.”⁹ Just as in *Palmetto Communications Co.*, 6 FCC Rcd 5023, 5024 (Rev. Bd. 1991), it is obvious that the evidence adduced in this hearing “might collaterally reflect adversely” on ClearComm.¹⁰

Yet even if the scope of the proceeding was crystal clear, the Presiding Officer has failed to adequately consider the range of issues related to ClearComm that may arise in this case and which warrant intervention.¹¹ The lone subject of the *HDO* is the conduct of Messrs. Breen and Easton while *officers of PCS 2000*.¹² This hearing, therefore, will focus on nothing else other than the conduct of ClearComm and its former principals in the Round 11 PCS C Block auctions.¹³ Grounds for intervention can not be more clearly stated.

Apparently in response to ClearComm’s legitimate concerns, the Presiding Officer suggests that ClearComm should rest easily on the sidelines because the Bureau believes “it is highly unlikely that any of the findings in this case would ever be used against ClearComm in the future” and that any factual exploration of ClearComm’s “qualifications” is “extremely remote.” Order at ¶¶ 11,12. In point of fact, however, the Bureau has no such exclusive control over the fact-finding in this case, and

⁹ *West Jersey Broadcasting Co.*, 89 FCC 2d 469, 473 (1980); see also *Quality Broadcasting Corp.*, 4 R.R.2d 865, 866 (1965).

¹⁰ ClearComm also notes, as the Commission is well aware, that if Mr. Breen is held to “meet[] the relevant character qualification to hold a Commission license” he will be permitted to exercise stock warrants in ClearComm’s parent, giving him a stake in the company. See, *PCS 2000 NAL* at ¶4. Therefore ClearComm has a clear interest in the grant or denial of Westel’s application.

¹¹ ClearComm has argued intervention is appropriate both as a matter of right and under the discretionary standard. 47 C.F.R. § 1.223(a) and (b).

¹² *HDO*, at ¶1.

¹³ The Order asserts that ClearComm’s contentions regarding the potential impact of this hearing on its standing before the Commission are “purely conjectural.” Order at ¶ 12. Yet, absent a concretely defined scope of the hearing or the nature of the parties cases, ClearComm is left no recourse beyond conjecture.

ClearComm should not be made to rely on such assurances to protect its reputation before the Commission and the financial welfare of its investors. Certainly Mr. Easton¹⁴ – whose petition for reconsideration of the *HDO* is pending¹⁵ – denies the conclusions of *PCS 2000 NAL*.¹⁶ Similarly, Mr. Breen’s attorneys has denied the factual suppositions contained in the *HDO*, which are taken directly from *PCS 2000 NAL*.¹⁷ Therefore, rather than “unlikely” or “remote”, there is *every indication* that this proceeding will re-examine ClearComm’s conduct addressed in the *PCS 2000 NAL*. ClearComm must be allowed to participate in such proceedings.

Even if the Commission denied intervention as of right, ClearComm urges acceptance of the Bureau’s argument for discretionary intervention based on the fact that the company has “established that it has an interest in the proceeding” and demonstrated that it is “well able to assist in the discovery of evidence of the events relevant to the designated issues.”¹⁸ Many of the questions raised in the *HDO*

¹⁴ As partners in Romulus Communications, Messrs. Easton and Breen were ClearComm’s bidding agents during the C Block auctions. ClearComm is seeking damages in District Court for their alleged misconduct and recovery of all costs arising out of that alleged misconduct. The Presiding Officer’s reliance on *Arizona Mobile Telephone Co.*, 80 FCC 2d 87, 90 (Rev. Bd. 1980) to dismiss this point is misplaced. Order ¶ 10. That case, in which creditors sought intervention in a license proceeding, applied its prohibition only where intervention as a matter of right was sought “solely on the ground” that a party has a financial stake in the survival of the parties. Such is not the case here.

¹⁵ Petition for Reconsideration of Anthony T. Easton, WT Docket 97-199 (filed Oct. 6, 1997).

¹⁶ Id. at 24 (“[T]he Commission’s investigative finding as to his conduct cannot have any preclusive effect under the doctrines of res judicata...or collateral estoppel”).

¹⁷ Motion for Summary Decision of Westel Samoa, Inc., Westel, L.P and Quentin L. Breen, WT Docket 97-199, at 33-34 (filed Jan. 21, 1998).

¹⁸ Wireless Telecommunications Bureau’s Comments in Support of Petition to Intervene at ¶ 4 (Nov. 24, 1997) (Ex. C); *See also, Palmetto Communications Company*, 6 FCC Rcd 5023, 5024 (Rev. Bd. 1991) (party’s participation may help “sharpen up the evidence”). The Presiding Officer has decided against this rationale on several grounds. First, even absent intervention, ClearComm’s witnesses may be forced to cooperate. If this test was supported, parties would never be entitled to discretionary intervention because any licensee could otherwise be required to produce information. Second, he posits that

(...Continued)

are based on information supplied to the Commission by ClearComm during the course of the Commission's previous investigation.¹⁹ As set out above, ClearComm's participation is central to the essence of this proceeding. Accordingly, granting ClearComm's petition to intervene will enable the Presiding Officer to rule on the designated issues based on the most complete record possible.

For all the foregoing reasons, the Commission should grant ClearComm's Petition for Review and authorize its full participation in the above-captioned proceeding immediately.

Respectfully submitted,

CLEARCOMM, L.P.

By: 

Robert L. Pettit

Richard H. Gordin

Bryan N. Tramont

of

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ClearComm must show that the "Wireless Bureau is unwilling, unable, or incapable of fulfilling its responsibilities" as an intervention pre-requisite. Order ¶ 13. ClearComm wonders if any petition could ever meet that burden. Here, ClearComm's role is not to supplant the Bureau, but to augment the parties' discovery efforts. Third, the Presiding Officer criticizes ClearComm's failure to show that any "information which it does possess is not available for the use of the Wireless Bureau." Order ¶ 13. Surely ClearComm should not be penalized for cooperation with the Bureau's information requests for material the Bureau could obtain under Section 308(b). Finally, the Presiding Officer notes that ClearComm "failed to show that it alone possesses any factual evidence necessary for the development of a full and complete record." Order ¶ 13. Such a requirement, however, would encourage licensees to withhold facts as a means to later "bribe" their way into proceedings.

¹⁹ See e.g. *HDO* ¶ 15 (citing Independent Counsel's Report, re: Mr. Easton's searches of Ms. Hamilton's desk); *HDO* ¶ 17 (citing Independent Counsel's Report re: Mr. Easton's possible destruction of documents); *HDO* ¶ 20 (citing Independent Counsel's Report re: Mr. Easton's representations to the Unicom Board). This report has been attacked by Mr. Breen. See, Westel Motion for Summary Decision, WT Docket No. 97-199, at 33-34 (filed Jan. 21, 1998).

AFFIDAVIT OF TYRONE BROWN

I, Tyrone Brown, Senior Vice President of ClearComm, L.P., a broadband PCS C Block licensee, declare that I have read the foregoing Expedited for Review Application and that the facts contained therein are true and correct to the best of my personal knowledge and belief.

I declare under penalty of perjury that the foregoing is true and correct.



Tyrone Brown

January 26, 1998

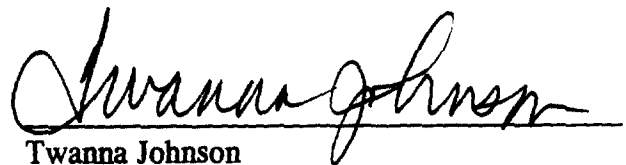
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